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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

EDWARD CHAMBERLIN,
Plaintiff and Appellant,

v.

FUTURE SOUND, LLC,
Defendant and Respondent.

A135408

(Alameda County
Super. Ct. No. RG10515569)

Edward Chamberlin appeals from a judgment after court trial on his complaint against his former employer. He contends the trial court erred in finding he was paid for all his accrued vacation time and in awarding respondent the full amount of attorney fees it requested. We affirm.

STATEMENT OF THE CASE

On May 17, 2010, appellant filed a complaint for damages against his former employer, Future Sound, and several individuals alleged to be owners and/or shareholders of the company, alleging he was not paid amounts he was owed in commissions, vacation, and unreimbursed expenses.

In his first cause of action for breach of contract, appellant alleged that Future Sound breached its contract with him, which was partly written, partly oral and partly implied, by failing to pay him commissions he had earned, to pay him for accrued and unused vacation, and to reimburse him for expenses he incurred for the benefit of Future

Sound. Appellant alleged he had suffered and continued to suffer a loss of income and benefits in an amount not less than \$100,000.

In a cause of action for quantum meruit, appellant alleged that Future Sound failed to pay him, as promised, the reasonable value of services he performed at Future Sound's request, an amount of at least \$100,000.

Appellant's third cause of action for violation of the Labor Code alleged that, at the time of his termination, appellant had accrued unpaid commissions and bonuses in the amount of at least \$100,000; that Future Sound had refused and continued to refuse to pay him for wages earned and unearned, accrued and unused vacation, and reimbursement of expenses incurred for Future Sound's benefits as required by Labor Code section 201; that this failure to pay was willful; and that due to the willful failure to pay, appellant was entitled to a penalty of at least \$3,857 under Labor Code section 203. Appellant requested reasonable attorney fees, costs and interest under Labor Code sections 218.5 and 218.6.

A fourth cause of action, for breach of fiduciary duty, alleged various acts and omissions by Peter Lee, Paul Lee, Lun Lee, and Somei Lee. Appellant alleged that he was a minority shareholder "by virtue of his years of contribution of unpaid compensation and expenses to Future Sound to use as working capital"; that Peter Lee offered to designate appellant a partner; that Lun Lee, Peter Lee's father and an investor in the company, referred to appellant as president of the company in front of other employees; that these individual defendants, with responsibility for management of the company, for the purpose of avoiding responsibility to appellant as a minority shareholder, terminated appellant's employment without compensation for appellant's interest in the company; that as a proximate result of these wrongful acts and omissions, appellant suffered and continued to suffer the loss of use of money invested in Future Sound; and that the defendants' acts were committed maliciously, fraudulently and oppressively, with the wrongful intention of injuring appellant, justifying the imposition of punitive damages.

Finally, in a cause of action for declaratory relief, appellant sought a judicial declaration that he was owed additional commissions for work he performed under contractual arrangements with Future Sound.

On April 26, 2011, the trial court granted Future Sound's motion for summary adjudication of the fourth cause of action for breach of fiduciary duty and denied summary adjudication of the first cause of action for breach of contract.

On November 28, 2011, the parties waived jury trial. Court trial, without a court reporter, began on November 30 and continued on December 1, 5, 6, 7.

On December 16, the court issued a tentative decision in Future Sound's favor, finding, among other things, that Future Sound paid appellant for four weeks of vacation at the 25 percent reduced rate of base salary that the company had imposed on the entire sales workforce. Appellant filed a "Request for Controverted Issue to be Addressed in the Tentative Decision," asking how the court's decision on this point was consistent with the admission in Peter Lee's declaration in support of motion for summary judgment that appellant was paid for two weeks of vacation.

On January 11, 2012, the court filed its proposed statement of decision, responding to appellant's request. Appellant filed objections, and the court filed its statement of decision and judgment on February 2. Judgment in favor of Future Sound was filed on February 2, 2012, specifying that Future Sound, as the prevailing party, was to recover costs and attorney fees subject to the memorandum of costs.

Appellant filed a motion to vacate judgment or for a new trial on February 16, which was denied on April 16. Future Sound's motion for reasonable attorney fees was heard on April 5 and granted on April 16 in the amount of \$146,946.50. On May 18, the court filed an amended judgment specifying that Future Sound was to recover from appellant a total of \$150,519.36 (\$3,572.86 in costs and \$146,946.50 in attorney fees).

Appellant filed a timely notice of appeal on May 4, 2012.

STATEMENT OF FACTS

The facts, as relevant to this appeal, are taken from the trial court's statement of decision.¹ Appellant worked as a salesperson for Future Sound from January 30, 1998, to November 15, 2008, employed as an " 'at will' " employee pursuant to an oral agreement, and was paid a base salary of \$3,000 per month. In October 2008, due to a significant downturn in business, appellant was informed that some staff would be laid off and that the base salaries of the salespeople who remained would be reduced by 25 percent effective November 15, 2008. Future Sound gave appellant reasonable notice of its intent to reduce his base monthly salary.

Appellant requested, and was granted by Peter Lee, two weeks of vacation, beginning November 15, 2008. On or about December 1, appellant did not return to work. During the first two weeks of December, Paul Lee spoke with appellant by telephone and granted appellant's request for an additional two weeks vacation. Appellant exhausted all his earned or accrued vacation time by December 15, 2008. He did not return to work at Future Sound after this date.

On December 14, appellant filed a claim with the Employment Development Department, stating he was separated from his employment with Future Sound and his

¹ Appellant states certain facts that differ from those found by the court but provides no evidentiary support for them. For example, appellant states that he began working for Future Sound in 1994 but his supporting citation is only to his complaint, which does not even specify a starting date for his employment.

The trial court found appellant's testimony at trial was not credible: "[His] testimony was often contradicted by his deposition testimony. [His] memory of conversations was also inconsistent with the documentary evidence. [His] summary of what he believed were sales and invoices attributable to his efforts was, in large part, undermined by the testimony of employees who, in fact, did the work. [His] opinions about how much commission he was entitled to while he worked for Future Sound lacked evidentiary support. [His] numbers were not supported by evidence."

By contrast, the court expressly found the testimony of Peter Lee, Paul Lee and Michelle Lee credible, as well as that of several other witnesses for Future Sound who had been coworkers of appellant.

last work day was November 29, 2008. The reason for separation was given as “Company said sales were not high enough to support overhead.”

The court found that Future Sound paid appellant for four weeks of vacation, from November 16 to December 15, 2008, at the 25 percent reduced rate of base salary the company had imposed on its entire sales workforce. Future Sound did not layoff or fire appellant, and appellant did not formally resign from employment. Future Sound believed, reasonably, that appellant ended his employment with the company by filing his “ ‘Notice of Unemployment Insurance Claim Filed’ that included [appellant’s] statement that [appellant’s] last day worked was November 29, 2008.” Future Sound did not challenge appellant’s request for unemployment benefits, and appellant collected unemployment benefits based on his separation from employment with Future Sound until approximately January 2011.

The court found that Future Sound did not breach its oral contract with appellant and did not violate the Labor Code by failing to pay appellant “ ‘wages earned and unpaid.’ ” Appellant was paid his base salary of \$3,000 per month through November 15, 2008. Future Sound’s payment to appellant for his vacation, November 16 to December 15, at a 25 percent reduced rate was not in bad faith and not willful, its payment for the vacation at “ ‘the employee’s base pay at the time of vacation’ followed the terms in Future Sound’s employee Handbook”; and the company paid the reduced amount “with the honest belief that the payment was in full compliance with the Labor Code.” The court found that Michelle Lee testified credibly that appellant was paid for four weeks of vacation after November 15, 2008, and that appellant testified in his deposition that he took and was paid for four weeks vacation.

DISCUSSION

I.

Appellant contends that the evidence shows he was paid for only two, not four, weeks of vacation. In a declaration offered in support of Future Sound’s motion for summary adjudication, Peter Lee stated, “In the final months of [appellant’s] employment with Future Sound, [appellant] requested, and was granted, use of two weeks of accrued

vacation days.” Appellant argues that this was a judicial admission, not contradicted by any evidence at trial, that appellant was *not* paid for *four* weeks of vacation.

The trial court addressed Lee’s statement in the statement of decision as follows: “Although Defendant Peter Lee recited in his Declaration in Support of Motion for Summary Judgment that [appellant] was paid for only two weeks of vacation, Defendant’s explanation at trial of the actual employment arrangement between [appellant] and Defendant supported Defendants’ position at trial that [appellant] had actually been paid for all of his earned vacation. The court finds that Defendant’s testimony at trial was credible though arguably inconsistent.”

The court’s statement of decision discusses the evidence directly supporting its determination that appellant was paid for four weeks of vacation. The trial court found that appellant requested and was granted two weeks of vacation, beginning November 15, 2008, *by Peter Lee*. It separately found that during the first two weeks of December 2008, appellant requested and was granted an additional two weeks of vacation *by Paul Lee*. The court found that Future Sound paid appellant for four weeks of vacation, from November 16 to December 15, 2008, at the 25 percent reduced rate of base salary; that this reduced rate payment followed the terms of the company’s employee handbook. The court expressly found credible Michelle Lee’s testimony that appellant was paid for four weeks of vacation after November 15 and that Defendant’s exhibit 32, a log of employees’ vacation time that this witness prepared, was accurate in showing appellant was paid for four weeks of vacation. The court also quoted appellant’s deposition testimony that he took four weeks’ vacation starting December 1 and “[t]hey stopped paying me the \$3,000 a month that I had been accepting—well, my regular paycheck as of, I believe, November 30th. Then I had like—I was collecting vacation pay, I think, through the first of the year.” While this appellant’s testimony states different dates for the vacation than Future Sound’s evidence—December 1 to 31 rather than November 15 to December 15—it clearly states that appellant took *and was paid for* four weeks of vacation.

Appellant relies upon the principle that a party is bound by its judicial admission: “[A] judicial admission cannot be rebutted: It estops the maker.” (*Uhrich v. State Farm Fire & Casualty Co.* (2003) 109 Cal.App.4th 598, 613.) In his view, Peter Lee’s declaration contains a binding judicial admission that appellant was paid for *only* two weeks of vacation. The declaration, however, does not say “only”: Peter Lee declared, “In the final months of [appellant’s] employment with Future Sound, [appellant] requested, and was granted, use of two weeks of accrued vacation days.”

The trial court expressly focused on this point. When the tentative decision was issued, appellant asked the court to explain how its conclusion that he was paid for four weeks of vacation was consistent with the “admission” in Peter Lee’s declaration that Future Sound “only paid [appellant] for two weeks of vacation.” The court responded by adding to its proposed statement of decision the paragraph quoted above, stating that Future Sound’s explanation at trial of the “actual employment arrangement” supported the company’s position that appellant had been paid for all his earned vacation. Appellant pressed the point, arguing that the court’s explanation was vague, ambiguous and did not “explain ‘what explanation . . . of the actual employment arrangement’ justified ignoring a sworn statement.” The court then added several points to the statement of decision it ultimately rendered. Instead of simply stating that appellant requested and was granted vacation beginning November 15, 2008, as it had in the tentative decision, the statement of decision stated that appellant was granted two weeks of vacation “by PETER LEE,” beginning November 15, and was later granted “an additional two weeks of vacation by PAUL LEE.” The court added to its findings of fact that Michelle Lee’s testimony that appellant was paid for four weeks of vacation was credible; that the vacation log she prepared, showing that appellant was paid for four weeks of vacation, was accurate; and that appellant testified at his deposition that he was paid for four weeks of vacation.

The trial court did not treat the statement in Peter Lee’s declaration as a judicial admission that appellant was paid for *only* two weeks of vacation; rather, it treated the statement that appellant was granted “use of two weeks of accrued vacation days” as one

piece of evidence that was, to the extent inconsistent, overcome by other evidence. The trial court evaluated not only Peter Lee's declaration but also the trial testimony of appellant, Peter Lee, Michelle Lee and other witnesses, none of which is available for our review because no reporter's transcript was prepared. According to the accepted rules of appellate review, "a judgment or order of the trial court is presumed correct and prejudicial error must be affirmatively shown. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)" (*Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 187.) " 'In the absence of a contrary showing in the record, all presumptions in favor of the trial court's action will be made by the appellate court.' " (*Ibid.*, quoting *Bennett v. McCall* (1993) 19 Cal.App.4th 122, 127.) "The party appealing has the burden of overcoming the presumption of correctness. For this purpose, it must provide an adequate appellate record demonstrating the alleged error. Failure to provide an adequate record on an issue requires that the issue be resolved against the appellant. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295–1296.)" (*Defend Bayview Hunters Point Com. v. City and County of San Francisco* (2008) 167 Cal.App.4th 846, 859–860.)

Appellant has pointed to nothing in the record before this court that provides a basis for reversing the trial court's determination.

II.

Appellant next contends that the statement of decision contains an error of law in the trial court's finding that Future Sound's "underpayment" was not "willful." The challenged finding was that Future Sound's payment for appellant's vacation time at the 25 percent reduced rate was "not in bad faith, was not willful."

As used in Labor Code section 203, concerning employers' willful failure to pay the wages of an employee who quits or is discharged, " 'willful' means that the employer intentionally failed or refused to perform an act which was required to be done." (*Ghory v. Al-Lahham* (1989) 209 Cal.App.3d 1487, 1492.) Appellant's point is that an underpayment is "willful" even if it is not made with improper intent: "[T]o be at fault within the meaning of the statute, the employer's refusal to pay need not be based on a deliberate evil purpose to defraud workmen of wages which the employer knows to be

due.” (*Barnhill v. Robert Saunders & Co.* (1981) 125 Cal.App.3d 1, 7.) But the trial court found that Future Sound did not fail to pay appellant the wages he was due; there was no “underpayment.” The court’s finding that the payment at the reduced rate was not willful—that in making this payment, Future Sound did not intentionally fail or refuse to “perform an act which was required to be done” (*Ghory v. Al-Lahham, supra*, at p. 1492)—was not an error of law.

III.

Appellant’s final contention is that the trial court’s decision on attorney fees was not supported by substantial evidence. Future Sound was represented in this case first by the law firm Pearson, Simon, Warshaw & Penny, LLP (PSWP), and later by the Law Office of Barry K. Tagawa. Appellant contends there was no evidence PSWP’s work or rates were reasonable and all rates should have been reduced to the \$250 per hour charged by Mr. Tagawa. He also urges that the hours billed should have been apportioned between the Labor Code claim, for which attorney fees are expressly authorized by Labor Code section 218.5, and the four non-statutory claims for which attorney fees are not allowed.

The trial court has broad authority to determine the amount of a reasonable attorney’s fee. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095.) “ ‘The “experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong’—meaning that it abused its discretion. (*Serrano v. Priest* (1977) 20 Cal.3d 25, 49; *Fed-Mart Corp. v. Pell Enterprises, Inc.* (1980) 111 Cal.App.3d 215, 228 [an appellate court will interfere with a determination of reasonable attorney fees ‘only where there has been a manifest abuse of discretion’].) [¶] The reasonable hourly rate is that prevailing in the community for similar work. ([*Margolin v. Regional Planning Com.* (1982) 134 Cal.App.3d 999,] 1004; *Shaffer v. Superior Court* (1995) 33 Cal. App. 4th 993, 1002.) [¶]. . . [¶] ‘It is well established that the determination of what constitutes reasonable attorney fees is committed to the discretion of the trial court [Citations.] The value of legal services

performed in a case is a matter in which the trial court has its own expertise. [Citation.] The trial court may make its own determination of the value of the services contrary to, or without the necessity for, expert testimony. [Citations.] The trial court makes its determination after consideration of a number of factors, including the nature of the litigation, its difficulty, the amount involved, the skill required in its handling, the skill employed, the attention given, the success or failure, and other circumstances in the case.’ (*Melnyk v. Robledo* (1976) 64 Cal.App.3d 618, 623–624.)” (*PLCM Group, Inc. v. Drexler, supra*, 22 Cal.4th at pp. 1095–1096.)

In its motion seeking attorney fees, Future Sound stated that it was represented by PSWP from November 4, 2009, through April 4, 2011, and incurred fees of \$71,806.50 during this time. From March 30, 2011 to February 29, 2012, Future Sound was represented by Tagawa, incurring \$71,165 in fees, and it would continue to incur fees until the hearing on the motion.

In support of the motion, attorney Barry Tagawa’s declaration detailed the work he performed for Future Sound on this case and summarized his firm’s costs and fees as reflected in the invoices sent to Future Sound. Tagawa described his training, employment history and experience, and stated that his usual current billing rate was \$350 per hour, which he knew to be “well below” the hourly rate charged by other Bay Area attorneys of like background, and he was charging Future Sound a discounted rate of \$250 per hour. He provided the training, employment history and experience of his legal assistant and stated that the \$100 per hour charged for her work on this case was “extremely fair and reasonable to Future Sound.” Future Sound submitted copies of Tagawa’s invoices to the court.

Future Sound also submitted the declaration of Peter Lee, which described, on information and belief, the work performed on Future Sound’s behalf by PSWP, summarized that firm’s billing statements, which totaled \$75,708.75 and included a \$2,000 courtesy discount, and provided copies of the billing statements. Lee explained that Future Sound had been paying PSWP in installments and as of the time of the declaration, had paid all but approximately \$10,000 to \$15,000 of the total owed. The

invoices show that the bulk of the work was performed by a partner billed at \$450 and later \$625 per hour and associates billed at \$365 or \$375 per hour, with a very small amount performed by a senior associate billed at \$525 per hour and senior partners billed at \$750 or \$780 per hour. Lee also summarized the costs and fees charged by Tagawa and stated that Future Sound was paying in installments, with approximately \$16,000 of the invoices currently remaining to be paid.

Appellant objected that Future Sound had not shown that PSWP's billing rates or the work it performed were reasonable and that the hours billed should be apportioned between the Labor Code claim and the other causes of action for which attorney fees are not recoverable. Future Sound subsequently submitted the declaration of Bruce L. Simon, a partner at PSWP, stating that he was responsible for supervising, assigning and reviewing work performed on Future Sound's case, and that it was his practice to try to assign attorneys to perform work on a cost efficient basis, taking into account the nature of the legal issues involved and the attorneys' skills, experience, billable rates and availability. Simon reviewed invoices before they were sent to Future Sound and determined they were reasonable; the firm charged its regular hourly billing rates but gave Future Sound a professional discount because it had been a former client of Simon's; and, in Simon's opinion, the attorney fees billed to Future Sound were reasonable and necessary.

Appellant's complaint that PSWP's fees were unreasonable appears to be based on the fact that the hourly rates charged by the firm exceeded those charged by Tagawa. Not only has appellant failed to offer any support for the contention that one attorney's lower hourly rate renders another attorney's rate unreasonable, but Tagawa himself declared that his rates were "well below" those charged by other attorneys in the area with similar backgrounds, and Simon declared that Future Sound was charged PSWP's regular rates. The court was aware of the nature and amount of work PSWP performed for Future Sound from the tasks described on the invoices submitted in support of the fee request as well as from its own observation of the early stages of the litigation, as reflected in the register of actions. We find no abuse of discretion.

Appellant's additional argument is that the attorney fees award should have been based not on the total fees incurred but only on the fees incurred in connection with the cause of action for violation of the Labor Code. In its memorandum of points and authorities in support of its motion for reasonable attorney fees, Future Sound urged that the trial court was not required to apportion the fees because the other causes of action shared common issues with the Labor Code violation. Noting the comment in appellant's trial brief, which the court also quoted in its statement of decision, that " "This case is, at the heart, a Labor Code case for recovery of wages unpaid at the termination of [appellant's] employment,' " Future Sound urged that it was neither possible nor practicable to segregate or apportion the fees attributable to defense of the Labor Code cause of action from those attributable to defense of the other causes of action.

In a supporting declaration, Tagawa stated that the causes of action for breach of contract, quantum meruit and declaratory relief involved "common issues" with the cause of action for violation of the Labor Code, and that, to the best of his knowledge, it was "neither possible nor practicable to segregate or apportion any of the legal fees incurred by Future Sound to defending solely against the alleged violations of the Labor Code from the legal fees incurred by Future Sound to defending against any of the other causes of action alleged in the Complaint against Future Sound." Tagawa offered the same opinion regarding the cause of action for breach of fiduciary duty (as to which the court had granted Future Sound's motion for summary adjudication), in that, like the other causes of action, it would require Future Sound to prove false appellant's allegations that he worked for years and failed to receive compensation and expenses he was due.

Appellant argued in the trial court, as he does here, that Future Sound failed to provide the court with evidence that any activities had to be done to defend against both the Labor Code claims and other causes of action. He asserts that because the causes of action were pursued equally, the total fee amount should simply be divided by the number of causes of action: The fees incurred prior to dismissal of the fourth cause of action should be divided by five and the fees incurred following dismissal of that cause of action should be divided by four.

“ ‘When a cause of action for which attorney fees are provided by statute is joined with other causes of action for which attorney fees are not permitted, the prevailing party may recover only on the statutory cause of action. However, the joinder of causes of action should not dilute the right to attorney fees.’ (*Akins v. Enterprise Rent-A-Car Co.* (2000) 79 Cal.App.4th 1127, 1133.) Upon determining an award of attorney fees and costs is appropriate under [a particular statute], apportionment of fees and costs similarly rests within the sound discretion of the trial court. (See *San Dieguito Partnership v. San Dieguito River Valley Regional etc. Authority* (1998) 61 Cal.App.4th 910, 920, disapproved on other grounds in *PLCM Group, Inc. v. Drexler* [, *supra*,] 22 Cal.4th 1084, 1097, fn. 5.) ‘ ‘A trial court’s exercise of discretion is abused only when its ruling ‘ ‘exceeds the bounds of reason, all of the circumstances before it being considered.’ ’ [Citation.]’ ’ (*San Dieguito Partnership, supra*, 61 Cal.App.4th at p. 920, quoting *Gonzales v. Personal Storage, Inc.* (1997) 56 Cal.App.4th 464, 479.) Such fees need not be apportioned when incurred for representation on an issue common to both causes of action in which fees are proper and those in which they are not. (See *Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 129–130.) Apportionment is not required when the claims for relief are so intertwined that it would be impracticable, if not impossible, to separate the attorney’s time into compensable and noncompensable units. (See *Akins v. Enterprise Rent-A-Car Co., supra*, 79 Cal.App.4th at p. 1133; *Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1111; Pearl, Cal. Attorney Fee Awards (Cont.Ed.Bar 1999) § 6.28, p. 6-38.)” (*Bell v. Vista Unified School Dist.* (2000) 82 Cal.App.4th 672, 686–687.)

In addition to the opinion of Future Sound’s attorney, the trial court had before it the invoices detailing work performed on the case and was personally familiar with the facts and issues from presiding over the case. Unlike the situation in *Bell v. Vista Unified School Dist., supra*, 82 Cal.App.4th 672 where the cause of action supporting an attorney fees award was of a limited nature in comparison to the case as a whole, the present case is one in which all causes of action involved the same fundamental underlying claim of unpaid earnings. As appellant acknowledged, and the trial court found, “ ‘This case is, at

the heart, a Labor Code case for recovery of wages unpaid at the termination of [appellant's] employment.' ”

DISPOSITION

The judgment is affirmed. Costs are awarded to respondent.

Kline, P.J.

We concur:

Haerle, J.

Lambden, J.